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In the Supreme Court of the United States

October Term, 1984

LAWRENCE A. SALIBRA, II,
Petitioner,

VS.

THE SUPREME COURT OF OHIO, and CHIEF JUSTICE FRANK CELEBREZZE, JUSTICE CLIFFORD BROWN, JUSTICE WILLIAM BROWN, JUSTICE ROBERT HOLMES, JUSTICE JAMES CELEBREZZE, JUSTICE RALPH LOCHER, JUSTICE A. WILLIAM SWEENEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. May a state supreme court disregard this Court's decision in *Schware* and distinguish among applicants for bar admission on grounds other than competency?

2. May a state supreme court, consistent with the equal protection clause, distinguish among equally qualified applicants for bar admission without examination solely on the basis of place of prior practice of law?

3. May a state supreme court, consistent with the equal protection clause, require an applicant to that state's bar to pass a bar examination when that court admits that the bar examination has no relationship to competency?

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OPINIONS BELOW

The Order of the Sixth Circuit denying rehearing and rehearing en banc is unpublished and is set forth in Appendix III. The Sixth Circuit Opinion affirming the trial court is reported at 730 F.2d 1059 and is set forth in Appendix I. The District Court Opinion dismissing the complaint is unreported and is set forth in Appendix II.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on April 3, 1984. On May 25, 1984, the Sixth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTION, STATUTES AND RULES INVOLVED

United States Constitution: 14th Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1343(3):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court Rules for the Government of the Bar of Ohio, Rule I, Section 9 and Rule VI:

RULE I

ADMISSION TO THE PRACTICE OF LAW

Section 9. Admission Without Examination

(A) An applicant for admission to the practice of law in Ohio without examination must file the following with the Clerk of this Court:

(a) an affidavit that the applicant has not engaged in the unauthorized practice of law in this State;

(b) a certificate of admission as an attorney at law in the highest court of another state or in the District of Columbia;

(c) a certificate, signed by a judge of a court of record of the state from which he seeks admission, indicating that the applicant is of good moral character and is in good standing in the bar of that state;

(d) certificates evidencing education equal to the requirements prescribed by this Court for admission to the practice of law in effect at the time the applicant was admitted in such other state;

(e) evidence showing that the applicant has, while a nondomiciliary of Ohio and for at least five years, engaged in legal work outside Ohio of such character and description as shall satisfy this Court that the applicant possesses the legal skills deemed adequate for admission to the practice of law in Ohio without examination; or evidence showing that applicant has for at least five years, engaged in the full-time teaching of law at a law school referred to in Section 1(D) of this rule;

(f) a certificate by an attorney at law of this State, who will present the applicant to this court pursuant to paragraph (B) of this rule, that the applicant is of good moral character and recommending him for admission to the practice of law in Ohio;

(g) applicant's affidavit that he is a citizen of the United States and that he is a resident of this State or intends to come into the State for the purpose of making it his permanent residence (if the applicant is not a resident of Ohio, his certificate shall not be issued until he has established residence in this State);

(h) an application and questionnaire, in duplicate, for use by the National Conference of Bar Examiners in making a character investigation;

(i) a fingerprint identification card on the form used by the Federal Bureau of Investigation;

(j) a nonrefundable fee of five hundred dollars;

(k) if the applicant's undergraduate and/or legal education was not received in the United States, a fee in the amount of three hundred dollars shall be required for evaluation of such education.

(B) Each applicant under this rule shall be presented to this Court in regular session by an attorney at law of this State. Upon receipt of the complete application pursuant to Division (A) of this rule, the Clerk of Court shall schedule said presentation and notify the applicant of the date and time of said presentation. It shall be the applicant's responsibility to notify the presenting attorney. The presentation shall be allotted five minutes and the applicant and presenting attorney shall appear in person.

(C) This Court shall pass on the application, and the Clerk shall notify the applicant of the Court's approval or disapproval.

(D) An applicant under this section shall not engage in the practice of law in this State prior to the filing of his application. To do so constitutes the unauthorized practice of law and will result in a denial of the application. This paragraph (D) does not apply to participation by a nonresident of Ohio in a cause being litigated in this State when such participation is with leave of the judge hearing such cause.

(E) An applicant who has taken and failed to pass an Ohio bar examination may not be admitted to the practice of law under this rule.

Rule VI

REGISTRATION OF ATTORNEYS

(1) Every attorney at law admitted to the practice of law in the State of Ohio shall file with the Clerk of this Court a Certificate of Registration together with a registration fee of Fifty Dollars ($50.00) per year payable biennially, upon a form to be furnished by the Clerk, said sum to be used for investigation of

complaints of alleged misconduct pursuant to Section (3) of Rule V of these rules, and Rule II of the Supreme Court Rules for the Government of the Judiciary, alleged unauthorized practice of law and such other purposes deemed necessary by the Supreme Court of Ohio for the Government of the Bar and of the Judiciary of Ohio.

(2) The Certificate of Registration shall be filed and the registration fee paid on or before September 1, 1983, and shall be for the period of September 1, 1983, to August 31, 1985.

(3) Thereafter, in each odd-numbered year, a new Certificate of Registration shall be filed and the registration fee paid on or before September 1 of that year.

(4) Persons admitted to the practice of law in this State between biennial registration dates shall file a Certificate of Registration at the time of admission and pay a fee of One Hundred Dollars ($100.00), unless such admission and registration occurs during the second year of the biennial registration period, in which event the fee shall be Fifty Dollars ($50.00).

(5) Every attorney admitted to the practice of law in another State but not in Ohio who performs legal services in this state solely for his employer as a full-time employee shall also file a Certificate of Registration and pay the fee as required by the foregoing sections of this rule. Said registration shall continue in force only so long as such attorney is so employed.

(6) An attorney who has not filed a Certificate of Registration and paid the required fee who practices law or holds himself out as authorized to practice law or who holds judicial office in this state shall be sub-

ject to disciplinary proceedings pursuant to Rule V of the Supreme Court Rules for the Government of the Bar of Ohio or Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio.

(7) Any attorney admitted to the practice of law in Ohio may acquire inactive status by making application to the Clerk for exemption from payment of the registration fee at the time of filing his Certificate of Registration. Such inactive attorney shall not be entitled to practice law nor hold himself out as authorized to practice law nor hold judicial office in this State until such time as he requests and is granted reinstatement to active status.

STATEMENT OF THE CASE

The Ohio Supreme Court[1] has promulgated a rule that permits some but not all experienced attorneys to become members of the Ohio bar without first passing the Ohio bar examination. The rule provides that any attorney who has been admitted to the highest court of any state and subsequently practiced law in any jurisdiction (whether or not admitted to the bar in that jurisdiction) for at least five years can be admitted to the Ohio bar without taking the bar examination *unless* the attorney has either lived or practiced in Ohio during any portion of that five year period.

Petitioner Lawrence A. Salibra, II graduated from the University of Wisconsin Law School in 1974, was admitted to the Wisconsin and Illinois Bars in 1974, and to the New York Bar in 1982; worked for a Chicago law firm

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1. Hereinafter the Ohio Supreme Court and its individual members will collectively be referred to as "Respondents."

from June, 1974, to November of 1976; and moved to Cleveland in 1976 to begin working as an attorney for Alcan Aluminum Corporation (hereinafter "Alcan"). He has been involved in a wide variety of legal work for Alcan including, but not limited to, state and federal litigation, local, state and federal tax matters, capital equipment acquisitions, environmental matters, personnel matters, loans, industrial bonds and other financings.

Petitioner realized that by virtue of Rule I, Section 9(A)(e) of the *Supreme Court Rules for the Government of the Bar of Ohio* (hereinafter "Rules") he was ineligible for admission to the Ohio bar without examination due *solely* to the fact that he lived in Ohio and engaged in legal work inside Ohio for a portion of the five year period. The Rule provides that:

> (A) An applicant for admission to the practice of law in Ohio without examination must file the following with the Clerk of this Court: . . .
>
> (e) evidence showing that applicant has, while a *nondomiciliary of Ohio* and for at least five years, *engaged in legal work outside Ohio* of such character and description as shall satisfy this court that the applicant possesses the legal skills deemed adequate for admission to the practice of law in Ohio without examination; or evidence showing that applicant has for at least five years, engaged in the full-time teaching of law at a law school referred to in Section 1(D) of this rule;

(Emphasis supplied.)[2]

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2. Rule I was amended since the filing of this action but none of the changes were relevant to this action except for the fact that the challenged portion of the Rule is now Section 9 rather than Section 8. All citations are to the current form of the Rules.

When his efforts to have Respondents voluntarily change the Rule proved fruitless, Petitioner filed suit in federal district court in Cleveland, Ohio. Jurisdiction was conferred on that court by 28 U.S.C. Section 1343 and the cause of action authorized by 42 U.S.C. Section 1983.

The complaint was filed on January 12, 1983, and requested the district court to issue a declaratory judgment that the challenged portion of Rule I, Section 9(A)(e) is unconstitutional in that it violates the equal protection clause of the United States Constitution.[3] On January 27, 1983, Judge Manos dismissed the complaint *sua sponte* on the grounds that it failed to state a claim (A copy of his opinion is attached hereto as Appendix II.)

Petitioner appealed and on April 3, 1984, the Sixth Circuit affirmed (Appendix I) and on May 25, 1984, the petition for rehearing or rehearing en banc was denied (Appendix III). This petition then followed.

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3. Petitioner alleged in his complaint in district court that he met all other requirements for admission under Rule I, Section 9. Respondents have not challenged this allegation and, in any event, since the district court dismissed the case on Civil Rule 12(b)(6) grounds, "the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true." 5 WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE Section 1357, at 594. *See also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS CASE PRESENTS THE IMPORTANT QUESTION AS TO WHETHER STATES MAY IMPOSE REQUIREMENTS FOR BAR ADMISSION THAT HAVE NO RELATIONSHIP TO COMPETENCY OR FITNESS TO PRACTICE LAW.

While Americans are becoming more mobile, there still exist considerable economic pressures against easy mobility of professionals, especially attorneys. As a past president of the American Bar Association has pointed out: "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *Time for a National Practice of Law Act*, 64 A.B.A. JOURNAL 557, 557 (1978).

Among these "fences" are the artificial barriers that the private bar has erected against potential competitors from the corporate and federal bars. These barriers, often erected with the aid of the state judiciary, have the effect of reducing competition, decreasing competency and increasing costs to the consumer.

Now, however, corporate and federal attorneys are fighting back. While this is the first case to reach this Court, federal courts have already had to deal with challenges to similar rules promulgated in several other states. Since the lower courts have not reached consistent conclusions, and since the rules are so patently unfair, there is every reason to believe this issue will continue to face the federal judiciary unless this Court gives some guidance.

Accordingly, just as this Court held in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) that the judiciary and private bar cannot combine to set prices, so too should it take this opportunity to hold that the judiciary and private bar cannot combine to keep federal and corporate attorneys from competing with private practitioners.

A. The Actual Purpose of the Challenged Rule Is to Restrict Competition, Not to Assure Competency or Fitness.

While Respondents and the lower courts have struggled mightily to construct a rational basis for Ohio's non-residency requirement, none of them has yet admitted what almost certainly is the true motivation behind the Rule—a fear of competition. Judge Murray in *Jensen v. Murphy*, Civ. No. HM80-608 (D.C. Md. 1980) pointed out very clearly why the private bar, aided by the state judiciary, has erected barriers against federal and corporate attorneys.[4]

> Regrettably, not all motivations behind restrictions on admission of out-of-state attorneys are laudable. In discussing the evolution of Rule 14 through the year 1967, William H. Adkins, II, a former Member of the Board, observed:
>
> > The unstated premise against liberal admission on motion is an economic one. It involves the fear of lawyers, especially those in the Washington suburban areas, that they will be immersed in a tidal wave of retired JAG officers, Department of Justice employees, and the like. Standards for

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4. That unpublished opinion is attached hereto as Appendix IV. The opinion was later withdrawn due to the fact that Maryland changed its rule and the Order of Dismissal is attached hereto as Appendix V.

> admission to the bar should not however, be based on a desire to suppress competition, a sort of protective tariff approach. The only permissible consideration . . . should be whether the application has sufficient professional experience to give a reasonable assurance of at least that degree of basic legal ability and perceptiveness measurable by a bar examination. . . .

Adkins, *What Doth the Board Require of Thee?* 28 MD. L. REV. 103, 112-113 (1968) (citation omitted).

Appendix IV at A31-A32.

While this fear of competition from corporate and federal attorneys may well be rational, it is not acceptable. Not only is there no connection to fitness or capacity to practice law, but indeed Respondents are actively seeking to keep fit and competent attorneys from entering the Ohio bar.

This Court should not acquiesce in the efforts of Respondents to attempt to keep the practice of law open to only a favored few and should instead reiterate that fitness and competency are the only valid requirements for bar admission. The writ of certiorari should be granted.

B. Several Well Reasoned Cases Have Held Unconstitutional Irrational and Unfair Barriers to Bar Admission, Similar to the Ohio Rule.

In a case virtually identical to this one, Judge Gibson of the Western District of Michigan struck down a Michigan Supreme Court rule comparable in effect to Ohio's. *Stein v. Coleman*, 214 U.S.P.Q. 118 (W.D. Mich. 1982).[5]

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5. The Michigan Supreme Court subsequently agreed to admit the plaintiff and change its rules. The opinion was then vacated as moot in the unpublished vacation order which is attached hereto as Appendix VI.

The *Stein* case involved a patent attorney employed by the Upjohn Company in Kalamazoo, Michigan. The Michigan rule, as interpreted by the Michigan Supreme Court, denied Stein admission to the Michigan bar without examination solely because he had practiced patent law for three years in Michigan rather than outside of the state. *Id.* at 119. Judge Gibson rejected the defendants' Rule 12(b)(6) motion using language that is directly applicable to the instant case.

> Defendants assert that, in view of the substantial interest of the state in prescribing the qualifications for admission to the bar, no constitutional claim is involved where a state declines to credit as the active practice of law the specialized practice of patent law which occurs within its borders. It may well be that the state's substantial interest leaves it free to decline to treat patent practice as the practice of law for purposes of state admission, but if it wishes to give credit for patent practice to some applicants and not others, it may have to justify the distinction drawn. As the Supreme Court said in *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957):
>
> > We recognize the importance of leaving states free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner . . . .
>
> Plaintiff has stated a claim sufficient to withstand the motion under Fed. R. Civ. P. 12(b)(6).

214 U.S.P.Q. at 119.

Judge Gibson went on to point out that:

> The challenged classification credits patent practice outside the state as the active practice of law, but does

> not so recognize patent practice within the state. No rational connection between this classification and the state's interest in assuming [sic] attorney fitness has been advanced, and the Court's consideration of the matter has disclosed none. The practice of patent law involves the same drafting of applications, evaluating of inventions, prosecuting of patents, filing of amendments and appeals and arguments in support thereof, applying the same laws and procedures, in each state of the union.

Id. at 120.

The challenged Ohio Rule credits corporate legal practice outside Ohio but does not so credit corporate legal practice within the state. The practice of law for Ohio corporate attorneys does not differ from such practice done for corporations outside of Ohio. As the Sixth Circuit found (Appendix I at A7), there is no meaningful way to distinguish *Stein* and Petitioner respectfully submits that *Stein* should be followed.[6]

The opinion of Judge Murray in *Jensen* is also relevant. The Maryland rule required that an applicant for admission via a less comprehensive bar examination have practiced in the state where he or she was admitted. The court held that this rule violated the equal protection clause in that there is no rational reason to assume:

> that one who has practiced tax law for thirty years as a private practitioner in the District of Columbia and who is admitted to the District of Columbia bar

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6. Ironically and absurdly, Bruce Stein could have moved to Ohio and Petitioner to Michigan and each would have been admitted to the bar of his new state based upon his practice in Michigan and Ohio, respectively, even though neither man could be admitted to the bar of his original state because he had practiced there.

> is any more familiar with Criminal Law, Property, or Torts than an attorney with equivalent experience working for the Internal Revenue Service in Washington but not admitted to the District of Columbia bar.

Appendix IV at A30.

The attention of the Court is also drawn to *Application of Brewer*, 506 P.2d 676 (Alaska 1973), where the Alaska Supreme Court pointed out the lack of a rational basis to a rule that forbade Judge Brewer admission to the Alaska bar on the grounds that he had served as a judge in Alaska, while it would have granted him admission had he been a judge anywhere else. Again the analogy is clear—had Plaintiff been a corporate attorney anywhere but Ohio he could now be admitted to the Ohio bar without examination.

C. The Sixth Circuit Has Effectively Ignored the Schware Case Which Sets Forth the Requirements That Must Be Met Before Discrimination in Bar Admission Can Pass Constitutional Muster.

In 1957, this Court decreed that "any qualification [for the bar] must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). While both the Sixth Circuit (Appendix I at A6) and the trial court (Appendix II at A15-A16) paid lip service to this requirement, in fact both courts totally ignored *Schware*.

Rule I, Section 9 sets forth a number of requirements for admission to the bar without examination, and most of these requirements are obviously related to competency or fitness. These valid requirements include an affidavit

that the applicant not have engaged in the unauthorized practice of law in Ohio (subsection a); admission to the bar in another state (subsection b); certification from a judge in that state that the applicant is of good moral character (subsection c); proof of educational preparation (subsection d); and a certificate from an Ohio attorney as to good moral character (subsection f).

In addition to these requirements, subsection (e) states that an applicant must have five years of legal experience and that that experience must have been gained while the applicant worked and lived outside of Ohio. The five years requirement is clearly related to competency and is not challenged here, but the requirements as to domicile and place of practice are very much at issue.

It is the contention of Petitioner that there is no rational connection between the domicile—place of practice requirement and Petitioner's fitness or capacity to practice law. Moreover, while neither Respondents nor the lower courts have been able to demonstrate any such connection, the lower courts upheld the Rule nonetheless.

1. The district court opinion does not set forth a rational connection between the challenged qualification and Petitioner's fitness or capacity to practice law.

The district court opinion sought to establish two rational bases for Rule I, Section 9(A)(e). The Court held that since Ohio law would not permit an unadmitted attorney to practice broadly it makes sense not to count such practice towards the five years requirement. The Court also stated that it is rational for the Ohio Supreme Court to assume that an attorney will gain broader experience if he practices where he is admitted. Whatever theoretical

merit these rationales might have in relation to the rules of another state, neither one has the slightest connection to the Ohio Rules.

a. *Ohio Does Not Limit Practice by Unadmitted Corporate Attorneys.*

The trial court claimed that "what plaintiff fails to realize, however, is that Ohio law carefully limits the type of legal work that can be performed by individuals not admitted to practice in Ohio." (Appendix II at A17). This statement is simply wrong.

Petitioner has registered with the Ohio Supreme Court under Rule VI, Section (5) which provides that:

> Every attorney admitted to the practice of law in another state but not in Ohio who performs legal services in this state solely for his employer as a full-time employee shall also file a Certificate of Registration and pay the fee as required by the foregoing sections of this Rule. Said registration shall continue in force only so long as such attorney is so employed.

The only limitation placed on corporate counsel registered under Rule VI(5) is that their legal work must be performed solely for their employer. Petitioner has engaged in a wide variety of legal work while employed by Alcan, and the trial court opinion fails to point out in what way this work differs in degree or kind from the legal services corporate attorneys employed in other states provide for their employers, or how Petitioner's work differs from that of an Ohio corporate attorney who is admitted to the Ohio Bar. In fact, there is no difference and there is no rational basis for the challenged Rule.

Furthermore, if an attorney were to practice law in Ohio without registering with the Ohio Supreme Court,

he or she would be subject to disciplinary proceedings. Rule VI(6) provides that:

> An attorney who has not filed a Certificate of Registration and paid the required fee who practices law or holds judicial office in this state shall be subject to disciplinary proceedings pursuant to Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

Thus the trial court clearly misstated the facts when it opined that "Ohio law carefully limits the type of legal work that can be performed by individuals not admitted to practice in Ohio." An attorney not admitted in Ohio and not registered under Rule VI would find that he is not merely *limited* in what he could do—he is *forbidden* from doing any legal work for anyone other than himself.[7] On the other hand, an attorney registered under Rule VI(5) is limited only in that he must perform his legal work solely for his employer—hardly a unique or significant limitation.

b. *The Ohio Rules Do Not Require That an Attorney Practice Five Years in a State Where Admitted in Order to Qualify for Admission Without Examination.*

The trial court made another baseless assumption when it asserted that "it is safe to presume that, *in general*, an individual will gain broader and more valuable experience from legal work in a state to which he is admitted to practice." (Appendix II at A17, emphasis in original).

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7. This statement is not strictly true since attorneys employed by the Federal Government often live in Ohio and practice in the Ohio Federal Courts without being admitted to the Ohio bar, and in fact those attorneys have their own cause of action against these defendants.

Whatever the validity of this presumption, it is wholly irrelevant. The Ohio Rules do not require that the five years of practice be done in a state where the applicant is admitted. Rule I(9)(A)(b) merely states that the applicant must have been admitted to the highest court of another state (or the District of Columbia), not that he have practiced for five years in such state. Thus, if Petitioner had moved to Pittsburgh in 1976 and practiced law with Alcoa's legal department without being admitted to the Pennsylvania bar, he would now be eligible to move to Ohio and be admitted under Rule I(9). The trial court's presumption is irrelevant since it cannot form a basis, rational or otherwise, for the Rule challenged in this action.

It is clear then that the trial court, having badly misread the Rules before issuing its opinion,[8] was unable to meet the *Schware* test of finding a rational connection between the challenged requirements and Petitioner's fitness or capacity to practice law.

2. The Sixth Circuit opinion does not set forth a rational connection between the challenged qualifications and Petitioner's fitness or capacity to practice law.

Apparently recognizing the lack of foundation to the district court's opinion, the Sixth Circuit invented two new "rational" bases—neither of which is relevant to the Rule.

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8. It may well be giving the district court too much credit to state that it read the Rules. The opinion was issued *sua sponte* just fifteen days after the complaint was filed and before the Respondents had made any appearance in the case. Since the Rules, other than Rule I, Section 9(A)(e), are not cited in the opinion, and are so badly misinterpreted, it is likely that the trial court merely assumed it knew their content and never bothered to read them.

a. *The Rule Does Not Encourage Attorneys Who Come Into Ohio With Less Than Five Years of Legal Practice to Take the Bar Immediately.*

The Sixth Circuit opinion states that "[a] first rationale, noted by the District Court, is that the Ohio rule encourages attorneys who come into the state with less than five years of legal practice to take the bar immediately." (Appendix I at A6). There are at least three things fundamentally wrong with this statement.

First of all, the trial court's comment that the Rule encourages a corporate attorney who has recently taken a job with an Ohio corporation to take the bar was made in the context of that court's misinterpretation of the relevant rules. The district court's opinion states first that, "Ohio law carefully limits the type of legal work that can be performed by individuals not admitted to practice in Ohio." (Appendix II at A17). As pointed out in the preceding section, this is incorrect since a corporate attorney registered under Rule VI(5) is limited only in that he can work solely for his employer—a limitation that most law firms place on their associates and not a limitation on the *type* of legal work he can perform. It was with this incorrect factual predicate that the District Court went on to state that the Rule encourages a corporate attorney to take the bar.

Secondly, the claim that the Rule encourages an applicant to take the bar sounds suspiciously like Lewis Carroll in one of his more whimsical moments. Respondents have promulgated Rule VI(5) which permits and indeed encourages corporate and federal attorneys to practice law in Ohio for their entire professional careers without taking the Ohio bar examination. The Sixth Circuit makes no attempt to explain why such a rule exists if

Respondents indeed want to encourage such attorneys to take the bar examination soon after moving to Ohio. The explanation for this failure is that no rational explanation is possible—there is absolutely no reason for believing that Respondents care when or if corporate and federal attorneys take the Ohio bar examination, much less that Respondents would prefer such attorneys to take the examination "immediately."

Finally, the lack of rationality is demonstrated by the fact that Respondents, in their Sixth Circuit brief, were unable to bring themselves to claim that the purpose of the exclusion of Ohio-based corporate and federal attorneys from admission under Rule I(9)(A)(e) was to encourage those attorneys to promptly take the bar. If Respondents do not see this as a rational basis, then it is clearly inappropriate for the courts to do so.

b. *The Ohio Rule Does Not Rationally Further the Purported State Objective of Encouraging Immigration.*

The Sixth Circuit opinion had only two sentences setting forth what it viewed as its other rational basis. "The Ohio rule's classification also has the reasonable goal of encouraging experienced attorneys to come into Ohio to practice law. Such encouragement is not necessary for attorneys in Salibra's position who have already been practicing law in Ohio for at least five years." (Appendix I at A6-A7).

The Sixth Circuit did not attempt to demonstrate what connection not admitting attorneys with five years of practice in Ohio has with the purported goal of encouraging immigration. It is true that admitting these attorneys would not promote the objective of encouraging immigration. It is equally true that admitting these attorneys

would not hinder this objective. In short, distinguishing attorneys by place of practice or residence has no impact, positive or negative, on the stated state objective. But a distinction can only "survive [equal protection] scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

Even if it be admitted that a rational state objective is the encouraging the immigration of experienced, competent attorneys from other states, that goal simply has no bearing on a decision to bar experienced, competent attorneys from admission to the Ohio bar solely on the basis of where they may have lived or worked. Since the exclusion has no relationship to this purported objective, it violates the equal protection clause.

c. *The Sixth Circuit Opinion Ignores Rule VI, Section 5.*

There is only one possible explanation for the existence of Rule VI(5). The purpose of the bar examination is to protect the public against incompetent attorneys. Respondents, mindful of that responsibility, have determined that corporations are sophisticated enough consumers of legal services so as not to require that their attorneys have passed Ohio's bar examination, so long as the attorneys have been admitted to another state's bar. Furthermore, since such an attorney must register with Respondents, they can discipline him should the necessity arise.

The Sixth Circuit held that "Salibra is not being treated unequally [since] he has received special treatment for the past eight years" and thus he cannot now complain when this practice does not count towards his effort to be admitted without taking the bar (Appendix I at A7). This holding, based on Petitioner's being permitted to practice under Rule VI(5), once again overlooks

the purpose of bar admission—assuring that all attorneys are qualified—as well as ignoring the reality that Petitioner is being treated differently from every non-Ohio based corporate attorney in America who practices where he is not admitted and wishes to be admitted to the Ohio bar. Since Respondents have determined that five years of practice presumptively establishes competence, and since Petitioner has practiced for five years, Respondents have determined that Petitioner is competent. It is a non sequitur for Respondents or the Sixth Circuit to now say that he gained his competence due to what they see as special treatment. If he is competent he should be admitted—that is exactly what *Schware* teaches us.

CONCLUSION

Respondents have determined that attorneys who meet certain criteria can be admitted to the Ohio bar without taking the Ohio bar examination. While most of these criteria are clearly related to competency or fitness to practice law, the requirement that an attorney must have lived and practiced outside of Ohio has no relationship to competency or fitness.

Therefore, Petitioner respectfully requests this Court to grant the petition for certiorari so that he be given an opportunity to receive the equal protection of the laws.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX I

Opinion of the United States Court of Appeals
For the Sixth Circuit

(Filed April 3, 1984)

No. 83-3088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE A. SALIBRA, II,
Plaintiff-Appellant,

v.

SUPREME COURT OF OHIO, *et al.*,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: LIVELY, *Chief Circuit Judge;* KENNEDY, *Circuit Judge;* and TAYLOR, *District Judge.**

KENNEDY, *Circuit Judge.* This case involves a challenge to a rule of admission to the bar of the State of Ohio. Appellant Lawrence Salibra (Salibra) is an attorney, a member of the Wisconsin, Illinois and New York bars. He wishes to be admitted to practice law in Ohio without taking the Ohio Bar examination, but is precluded by a

*Honorable Anna Diggs Taylor, United States District Court for the Eastern District of Michigan, sitting by designation.

rule of the Supreme Court of Ohio. Salibra challenges the constitutionality of this rule on equal protection and right to travel grounds, asking for a declarartory judgment. The District Ccurt dismissed his claim *sua sponte* under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and we affirm.

Rule I, § 8[1] of the Supreme Court Rules for the Government of the Bar of Ohio governs admission to the bar without examination.[2] Subsection (A)(e) requires that the applicant furnish:

> (e) evidence showing that applicant has, *while a non-domiciliary of Ohio and for at least five years,* engaged in legal work *outside Ohio* of such character and description as shall satisfy this court that the applicant possess the legal skills deemed adequate for admission to the practice of law in Ohio without examination . . . .

(Emphasis added.)

Salibra graduated from law school in 1974, practiced for a private firm in Illinois for two years, and then began work as corporate counsel for Alcan Aluminum Corp. in Cleveland, Ohio. He has continued to work for Alcan since 1976. Salibra has been able to practice law in Ohio for the last several years without being admitted to the bar by virtue of Ohio Supreme Court rule VII(5):[3]

> (5) Every attorney admitted to the practice of law in another state, but not in Ohio who performs legal services in this state solely for his employer as

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1. Now rule I, § 9.

2. Salibra maintains that he meets all the requirements for admission to the bar without examination except those contained in subsection (e).

3. Now rule VI(5).

a full-time employee shall also file a Certificate of Registration and pay the fee as required by the foregoing sections of this Rule. Said registration shall continue in force only so long as such attorney is so employed.

Salibra argues that rule I, § 8(A)(e) violates equal protection and denies him his right to travel because it requires five years of legal practice *outside* Ohio for admission without examination.

I.

In his brief Salibra argued that the District Court should not have dismissed his action *sua sponte* for failure to state a claim, without first having given him a hearing or a chance to submit a written argument. We recently disapproved of such *sua sponte* dismissals on the merits in *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983).[4] Under *Tingler*, a district court, when faced

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4. *See Martin v. Johnson*, 471 F.2d 704, 705 (6th Cir. 1973) ("this Court does not encourage dismissal of a complaint without notice to the plaintiffs or without affording them an opportunity to be heard"); *Brown v. Strickler*, 422 F.2d 1000, 1002 (6th Cir. 1970) ("dismissals of suits under the Civil Rights Act without notice to the plaintiffs and without providing at least some opportunity to argue in opposition thereto are not favored"). Two other Circuits have adopted this rule: *Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983), and *Dodd v. Spokane County*, 393 F.2d 330 (9th Cir. 1968) (plaintiff should at least have opportunity to submit written arguments).

To the contrary are *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556 (3rd Cir. 1980); *Leonhard v. U.S.*, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); and *Tamari v. Bache & Co.*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978), which hold that a district court does have the power to dismiss a complaint *sua sponte* for failure to state a claim without providing a hearing.

Tingler did not address, nor do we, *sua sponte* dismissals where the district court clearly lacks jurisdiction. *See Brown v. Strickler*.

with a complaint which it believes may be subject to dismissal, must:

(1) allow service of the complaint upon the defendant;

(2) notify all parties of its intent to dismiss the complaint;

(3) give the plaintiff a chance to either amend the complaint or respond to the district court in its notice of intended *sua sponte* dismissal;

(4) give the defendant a chance to respond or file an answer to motions;

(5) if the claim is dismissed, state its reasons for the dismissal.

The District Court in Salibra's case omitted steps 2 through 4, and its dismissal was consequently improper under *Tingler*. Counsel for Salibra has requested by letter, however, that we decide the case on the merits. In view of this request and the posture in which the case reaches up, we will not remand this case to the District Court for further proceedings. The case was decided prior to our decision in *Tingler*, and is now before us fully briefed on the merits. The parties agree that the issues involve solely questions of law, fully reviewable by this court. In *Tingler* we criticized *sua sponte* dismissals on the merits as being ultimately wasteful of judicial resources. In the interest of conservation of those resources we now address the merits of Salibra's case.

II.

Salibra points out that if he had practiced law in any state other than Ohio for the past five years as a resident of any other state, he would now be eligible for

admission to the Ohio Bar without examination. Because he chose to practice in Ohio, however, he must now take the bar examination to become a member. He submits that this is a violation of the equal protection clause of the Fourteenth Amendment. Salibra argues that the equal protection clause forbids Ohio from crediting only work done outside Ohio for admission to the bar without examination.

Salibra has the burden of demonstrating the unconstitutionality of the challenged classification. *Parham v. Hughes*, 441 U.S. 347, 351 (1979).[5] The classification is not based on a "suspect class" or other immutable human attribute and does not involve a "fundamental right",[6] and so need have only a reasonable basis to pass constitutional muster. *Id.; Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Vance v. Bradley*, 440 U.S.

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5. *Parham v. Hughes* and other cases cited which deal with equal protection challenges refer generally to "state laws" and "legislative classifications". The rule at issue here was not enacted by the Ohio State legislature, but was rather promulgated by the Ohio Supreme Court, also a popularly elected body, acting in a quasi-judicial capacity. However, we believe that the same analysis applies here to state court-created rules as to state legislative enactments. The Supreme Court noted in *Konigsburg v. State Bar of California*, 366 U.S. 36, 45 (1961), which involved a challenge on grounds of violation of fourteenth amendment protection against arbitrary state action, "[t]he fact that [a] rule finds its source in the supervisory powers of the California Supreme Court over admissions to the bar, rather than in legislation, is not constitutionally significant." We believe that this distinction is likewise not significant for purposes of fourteenth amendment equal protection challenges. *See In Re Griffiths*, 413 U.S. 717 (1973); *Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983); *Bashir v. Supreme Court of Ohio*, 652 F.2d 641 (6th Cir. 1981); *Hawkins v. Moss*, 503 F.2d 1171 (1974), *cert. denied*, 420 U.S. 928 (1975).

6. *Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983) (no fundamental right to be admitted to the bar without examination); *see also City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (performance of economic activity is not a fundamental right for purposes of equal protection analysis).

93, 97 (1979); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 79 (1910); *Lowrie v. Goldenhersh*, 716 F.2d 401, 408-09 (7th Cir. 1983). *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) ("any qualification [for the bar] must have a rational connection with the applicant's fitness or capacity to practice law").

We find that there is a rational basis for the Ohio Supreme Court's distinction between work performed inside Ohio under a special rule and work performed outside of Ohio. A first rationale, noted by the District Court, is that the Ohio rule encourages attorneys who come into the state with less than five years of legal practice to take the bar immediately. Although the state will permit an attorney to practice law for a corporate employer without admission to the bar, concerns of knowledge and competency in Ohio law argue for a policy encouraging these corporate employees to take the bar exam soon after arrival in the state. A policy which would allow such attorneys to gain admission without examination after five years of practice would encourage them to practice without taking the bar, and this could have an adverse effect on the level of competence in corporate practice. A state's interest in regulating the practice of law within its borders is compelling, because lawyers are essential to the primary governmental function of administering justice. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bashir v. Supreme Court of Ohio*, 501 F.Supp. 288, 291 (S.D. Ohio 1980), *aff'd*, 652 F.2d 641 (6th Cir. 1981). *See In Re Griffiths*, 413 U.S. 717, 722-23 (1973); *Konigsberg v. State Bar of California*, 366 U.S. 36, 52 (1961).

The Ohio rule's classification also has the reasonable goal of encouraging experienced attorneys to come into Ohio to practice law. Such encouragement is not necessary

for attorneys in Salibra's position who have already been practicing law in Ohio for at least five years.

Moreover, Salibra is not being treated unequally in this case. On the contrary, he has received special treatment for the past eight years. The Ohio rules generally require that all persons practicing law in Ohio be members of the Ohio Bar.[7] Salibra has been able to practice law in Ohio only by virtue of the special exception applicable to corporate lawyers under Rule VII, §5. The point here is not whether attorneys employed by corporations have any more or less experience than attorneys otherwise employed. The salient issue is rather that for the past eight years the Ohio Supreme Court has given Salibra special treatment not accorded most lawyers. Now Salibra argues that *because* Ohio has allowed him to practice for more than five years without being admitted to the bar, it must now grant him the additional benefit of admission without examination. We fail to see how Salibra, who has received special treatment to this time, can now be a victim of an equal protection violation.

Salibra cites *Stein v. Coleman*, 214 U.S.P.Q. 118 (W.D. Mich. 1982), a very similar case, in which a member of the Wisconsin Bar moved to Michigan to work as a patent attorney for a corporate employer. The attorney was allowed to practice in Michigan without admission to the bar by virtue of a Michigan rule allowing practice by corporate counsel.[8] Another Michigan rule[9] allowed admission without examination for attorneys who have "actively practiced law" for three of the five years preceding ap-

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7. Supreme Court Rules for the Government of the Bar of Ohio, Rule I, § 1(E).

8. Rules for the Board of Law Examiners, Rule 5D.

9. Rule 5A(6)(a).

plication. The Michigan Board of Law Examiners denied the plaintiff's application for admission without examination on the grounds that he had not "actively practiced law" within the meaning of the rule by practicing in Michigan under the special provision for corporate employees.

Plaintiff brought suit against the Michigan Supreme Court, alleging equal protection and right to travel violations. Defendants moved for summary judgment on the ground that plaintiff had failed to state a claim, but the District Court found that he had stated a claim. The court explained that there was no dispute that plaintiff was otherwise qualified for admission without examination, and would have been admitted had he engaged in patent law practice for a corporation for three years outside the State of Michigan. 214 U.S.P.Q. at 119.

We cannot agree with the court's reasoning in *Stein*. A plaintiff does not state a claim under the equal protection clause by showing that he has not been granted a particular privilege, when the privilege may be granted to others similarly situated. The lines drawn by a classification need not be perfect nor drawn with "mathematical certainty" in order to be constitutional. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *Dandridge v. Williams*, 397 U.S. at 485; *Lindsley v. National Carbonic Gas Co.*, 220 U.S. at 79. Perhaps a different result would obtain here if the state were to focus its rules so as explicitly to grant the privilege of admission without examination to attorneys who have practiced for a certain time as corporate employees under special provisions in another state while not admitted to that state's bar. It would be difficult to find a rational basis for such a rule. The Supreme Courts of Michigan and Ohio, however, simply have general rules that allow attorneys who have practiced elsewhere for a certain time to be admitted to the bar without examina-

tion. They have chosen not to examine the particulars of such non-domiciliary practice, but rather to rely upon the standards of admission and practice in those other states. Attorneys coming from other states who are similarly situated to Salibra may be advantaged by this rule, but the fact that a rule results in some inequity does not mean that it violates the Constitution. *Schweiker v. Wilson*, 450 U.S. at 234; *Dandridge v. Williams*, 397 U.S. at 485; *Martin v. Walton*, 368 U.S. 25, 26 (1961); *Phelps v. Board of Education*, 300 U.S. 319, 324 (1936); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. at 79. The relevant inquiry is whether there is a rational basis for the rule, and we believe that there is.

III.

Salibra argues that the Ohio rule penalizes him for his choice of residency, thereby violating his right to travel. Proper invocation of the right to travel would require the state to show a compelling justification, rather than simply a rational basis, for its rule. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). We find, however, that Salibra has not properly invoked this right.

The cases applying the right to travel doctrine involve laws which distinguished between newcomers to a state, who were denied fundamental rights, and residents of longer duration, who were accorded such rights. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Salibra claims that he is penalized by the Ohio classification, but, unlike the plaintiffs in the above cases, Salibra is not the victim of unequal treatment on the basis of the duration of his residency in Ohio. Instead he is penalized as compared with certain non-residents of Ohio, i.e., those who have practiced law

for at least five years outside of Ohio. Salibra here did not travel. He has been a resident of Ohio for some eight years, and, like any other Ohio resident who has not practiced law outside the state for at least five years, must take the examination to gain admission to the bar. Salibra cites to no case which finds a right to travel violation resulting from preferences given to *non*-residents.

Even state regulation of the practice of law which may inhibit travel does not per se constitute a constitutional violation. *See Lowrie v. Goldenhersh,* 716 F.2d 401, 412-13 (7th Cir. 1983) (rule requiring five years practice in licensing state for admission without examination valid); *Hawkins v. Moss,* 503 F.2d 1171, 1179 (4th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975) (rule granting admission without examination only to members of bar in states granting reciprocity valid); *Moore v. Supreme Court of South Carolina,* 477 F.Supp. 527, 531 (D. S.C. 1977), *aff'd,* 577 F.2d 735 (4th Cir.), *cert. denied,* 439 U.S. 984 (1978) (rule requiring graduation from ABA approved law school for admission valid).

The right to travel doctrine has been applied only to cases involving the denial of "vital benefits," *Califano v. Torres,* 435 U.S. 1, 4 (1978), "fundamental rights" or "basic necessity of life," *City of Akron v. Beil,* 660 F.2d 166, 169 (6th Cir. 1981); *Hayes v. Board of Regents,* 495 F.2d 1326, 1328 (6th Cir. 1974). The doctrine has been applied, for example, to welfare assistance in *Shapiro v. Thompson*; to voting rights in *Dunn v. Blumstein*; and to non-emergency hospitalization in *Memorial Hospital v. Maricopa County.* Requiring Salibra to sit for and pass a bar examination to obtain admission to the Ohio bar does not amount to a denial of a basis necessity of life or a fundamental right. *Lowrie v. Goldenhersh,* 716 F.2d at 412.

We find that Salibra has no cause of action under either an equal protection or a right to travel theory, and the District Court properly dismissed this claim under Fed. R. Civ. P. 12 (b) (6). Because we find it unnecessary to remand the case for further proceedings we do not address Salibra's claim that the case should be heard by a different judge on remand.

Accordingly, the judgment of the District Court dismissing appellant's claim is affirmed.

APPENDIX II

Opinion and Order of the United States District Court

(Filed January 27, 1983)

No. C83-177

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAWRENCE A. SALIBRA, II,
Plaintiff,

v.

THE SUPREME COURT OF OHIO, *et al.*,
Defendants.

MEMORANDUM OF OPINION

On January 12, 1983, plaintiff, Lawrence A. Salibra, II, filed the above-captioned case alleging that the Supreme Court of Ohio and the individual justices of that court violated his civil rights under 42 U.S.C. § 1983.[1]

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1. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Specifically plaintiff alleges that Rule 1, Section 8(A)(e)[2] of the Supreme Court Rules for the Government of the Bar of Ohio is unconstitutional because it permits certain attorneys who have been practicing law outside of Ohio to be admitted without examinations while denying "admission without examination" to attorneys who have been practicing law within Ohio. Plaintiff alleges that this provision violates his constitutional rights to equal protection of the law and freedom to travel through and across state lines. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201, 2202,[3] that Rule 1, Section

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2. Rule 1, Section 8(A) of the Supreme Court Rules for the Government of the Bar of Ohio provides in pertinent part:

> (A) An applicant for admission to the practice of law in Ohio without examination must file the following with the Clerk of this Court:
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> . . . .
>
> (e) evidence showing that applicant has, while a non-domicilliary [sic] of Ohio and for at least five years, engaged in legal work outside Ohio of such character and description as shall satisfy this court that the applicant possesses the legal skills deemed adequate for admisssion to the practice of law in Ohio without examination; or evidence showing that applicant has for at least five years, engaged in the full time teaching of law at a law school referred to in Section 1(D) of this rule. . . .

3. 28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

8(A)(e) is unconstitutional. Jurisdiction is invoked under 28 U.S.C. § 1343.[4] For the reasons that follow, plaintiffs' complaint is dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

Plaintiff alleges the following in his complaint:

> 5. In May of 1974 the Plaintiff was graduated from the Wisconsin Law School. On May 31, 1974 he was admitted to the bar of the State of Wisconsin and was subsequently admitted to the bars of Illinois and New York on October 31, 1974 and November 23, 1982, respectively.
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> 6. From June of 1974 to November, 1976, Plaintiff was employed as an attorney in the Chicago office of the law firm of Sidley & Austin.
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> 7. Since November, 1976 Plaintiff has been employed by Alcan Aluminum Corporation as part of its legal department. He has worked in Cleveland for this entire period of time and has registered with the Supreme Court of Ohio pursuant to its rules.
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> . . . .
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> 9. The Defendant Supreme Court has promulgated various rules relating to the governance of the

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4. 28 U.S.C. § 1343 provides in pertinent part:

> (a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

bar of the State of Ohio. Among these rules is Rule 1, Section 8: "Admission Without Examination."

. . . .

10. Plaintiff is able to comply with all parts of Rule 1, Section 8 with the exception of subpart A(e) and in fact was recently admitted into the New York state bar after complying with very similar New York reciprocity admission requirements.

11. Plaintiff would in fact comply with subpart A(e) were it not for the fact that said subpart requires that five years of legal work be done *outside* the state of Ohio while the applicant is a non-domiciliary of Ohio while Plaintiff has completed his five years of legal work while residing in Ohio and working in Cleveland, Ohio.

12. There is no rational basis for the Defendant to permit reciprocal admission of attorneys who have been practicing law outside of Ohio while at the same time denying such admission to attorneys who have been practicing law within the state.

13. The Plaintiff has been denied his constitutionally protected rights to the equal protection of the law and freedom to travel through and across state lines.

The court will address plaintiff's equal protection and freedom of travel claims separtely.

I.

Plaintiff first alleges that Rule 1, Section 8(A)(e) violates the Equal Protection Clause of the Fourteenth Amendment. Absent a demonstration by the plaintiff that the challenged classification is based on a suspect criteria

or the impairment of a fundamental right, a state's professional licensing statute is deemed constitutional *if it is rationally related to a valid state objective. Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752 (1959). Ohio's state interest in promulgating Rule 1, Section 8(A)(e) is to protect the public and and [sic] to assure a competent bar. *Bashir v. Supreme Court of Ohio,* 501 F. Supp. 288 (S.D. Ohio 1980), *aff'd,* 652 F.2d 641 (6th Cir. 1981). *See also, Murphy v. State Board of Law Examiners,* 429 F. Supp. 16 (E.D. Pa. 1977). As the district court stated in *Bashir*:

> The state has the power to require high standards of qualification, such as good moral character or proficiency in the law before it admits an applicant to the bar. States maintain power over admission of attorneys to the bar as an incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L.Ed.2d 796 (1957); *Ross v. Reda,* 510 F.2d 1172 (6th Cir. 1975), *cert. denied* 423 U.S. 892, 96 S. Ct. 190, 46 L.Ed.2d 124 (1975). The only constitutional requirement is that the standards or qualifications required have a rational connection with the applicant's fitness or capacity to practice law. *Schware v. Board of Bar Examiners, supra.* A bar examination tests those skills and knowledge which have a logical, apparent relationship to those necessary to the practice of law. *Tyler v. Vickery,* 517 F.2d 1089 (5th Cir. 1975), *cert. denied* 426 U.S. 940, 96 S. Ct. 2660, 49 L.Ed.2d 393 (1976).

501 F. Supp. at 291.

Rule 1, Section 8(A) provides in pertinent part:

> (A) An applicant for admission to the practice of law in Ohio without examination must file the following with the Clerk of this Court:
>
> . . . .
>
> (e) evidence showing that applicant has, while a nondomiciliary [sic] of Ohio and for at least five years, engaged in legal work outside Ohio of such character and description as shall satisfy this court that the applicant possesses the legal skills deemed adequate for admission to the practice of law in Ohio without examination; or evidence showing that applicant has for at least five years, engaged in the full time teaching of law at a law school referred to in Section 1(D) of this rule. . . .

It is clear that the portion of Section 8(A)(e) that requires five years of legal work as a prerequisite to admission without examination is rationally related to a legitimate state goal. Plaintiff, however, claims that the additional requirement of Section 8(A)(e)—that the five years of legal work be performed outside Ohio—has no rational basis, since a person who has engaged in legal work within Ohio is presumably more knowledgeable about Ohio law than a person who has worked outside Ohio. What plaintiff fails to realize, however, is that Ohio law carefully limits the type of legal work that can be performed by individuals not admitted to practice in Ohio. Thus, plaintiff's generalization about the experience from work performed inside Ohio being superior to the experience from work performed outside Ohio is in fact just opposite of the fact. First, it is safe to presume that, *in general,* an individual will gain broader and more valuable experience from legal work in a state to which he is admitted to practice. Consequently, in an effort to ensure that all

applicants for admission *without examination* possess a minimal level of competence, the state may, as a benchmark, refuse to consider legal work performed within Ohio. Moreover, any hardships this provision might work in individual cases are minimized by the fact that an individual can always take the Ohio bar examination. Second, Section 8(A)(e) encourages individuals, such as plaintiff, who come into Ohio with less than five years of legal work, to take the Ohio bar examination as soon as they begin their legal work within the state. Although these individuals may engage in some legal work in Ohio without being admitted to practice, the state certainly has a legitimate interest in preferring that even this legal work be performed by individuals who have passed the Ohio bar examination and become subject to the disciplinary rules of the Ohio bar. Since Rule 1, Section 8(A)(e) is rationally related to several valid state objectives, plaintiffs [sic] equal protection claim is without merit. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752 (1959).

II.

Plaintiff's second claim is that Rule 1, Section 8(A)(e), violates his right to freedom of travel through and across state lines. In *Jones v. Helms,* ..... U.S. ....., 101 S. Ct. 2434, 2439-40 (1981), the United States Supreme Court reasoned:

> It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution. Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by this Court. See *Shapiro v. Thompson,*

> 394 U.S. 618, 629-631, 89 S. Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *United States v. Guest*, 383 U.S. 745, 757-759, 86 S. Ct. 1170, 1177-1179, 16 L.Ed.2d 239. The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Whatever its source, a State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another.

(Footnotes omitted). Nevertheless, the right to travel does not imply that a citizen carries with him from state to state an absolute right to practice a profession. *Hawkins v. Moss*, 503 F.2d 1171, 1178-79 (4th Cir. 1974), *cert. denied*, 420 U.S. 928, 95 S. Ct. 1127 (1975). *Accord*, *Lowrie v. Goldenhersh*, 521 F. Supp. 534 (N.D. Ill. 1981). In *Hawkins*, the Fourth Circuit upheld the constitutionality of a South Carolina Supreme Court rule exempting from the bar examination only those attorneys admitted to practice in a state granting reciprocity to South Carolina lawyers. The court reasoned:

> The right of federal citizenship as reflected in the "right to travel" and as protected by this provision is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation", but a profession, which is properly subject to state regulation, in any state to which he travels, though this is essentially what the plaintiff, in the exposition of this contention, posits. The exercise by a state of power to regulate reasonably the practice of law within its jurisdiction and to require of any applicant, whether a resident or a migrant, that he demonstrate sufficient proficiency in the law as a prerequisite to a license to practice, is, as we have seen perfectly permissible and

> represents no violation of this provision of the Fourteenth Amendment. . . . [T]here is no condition on the appellant's actual right to travel; the only condition relates to his right to practice a constitutionally regulated profession within the state. The State had a perfect constitutional right to require of the appellant that he demonstrate his proficiency in the law by an examination; that it exempts from that requirement some applicants for reciprocity reasons which serve a legitimate "substantial" or "important" state interest does not operate to relieve the appellant of so demonstrating his proficiency.

503 F.2d at 1178-79. (Citations and footnotes omitted). Since admission to practice in one state is not automatic admission to practice in another state, *Hawkins,* 503 F.2d at 1175-76, *Lowrie v. Goldenhersh,* 521 F. Supp. at 537, and since plaintiff can still be admitted to practice law in Ohio by passing the Ohio bar examination, Rule 1, Section 8(A)(e) is not so burdensome as to constitute a "penalty" against the exercise of the constitutional right to travel.

Accordingly, plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted. *See*: Fed. R. Civ. P. 41(b).[5]

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

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5. Fed. R. Civ. P. 41(b) provides:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff,

(Continued on following page)

No. C83-177

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAWRENCE A. SALIBR [sic], II,
Plaintiff,

v.

THE SUPREME COURT OF OHIO, *et al.*,
Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case, plaintiff's complaint is dismissed.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

Footnote continued—

in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX III

Judgment Entry of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing

(Filed May 25, 1984)

No. 83-3088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE A. SALIBRA, II,
Plaintiff-Appellant,

v.

THE SUPREME COURT OF OHIO, *et al.*,
Defendants-Appellees.

ORDER

Before: LIVELY, *Chief Judge*; KENNEDY, *Circuit Judge*; and TAYLOR, *District Judge.**

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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*Honorable Anna Diggs Taylor, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX IV

Opinion of the United States District Court of Maryland in William Jensen v. Robert C. Murphy et al.

(Filed November 13, 1980)

Civil No. HM80-608

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM JENSEN

v.

ROBERT C. MURPHY, Chief Judge; MARVIN H. SMITH, Judge; J. DUDLEY DIGGES, Judge; JOHN C. ELDRIDGE, Judge; HARRY A. COLE, Judge; RITA C. DAVIDSON, Judge; LAWRENCE F. RODOWSKY, Judge; Court of Appeals of Maryland, Courts of Appeals Building, Annapolis, Maryland 21401; JERROLD V. POWERS, Chairman; CHARLES H. DORSEY, JR., Member; WILLIAM H. PRICE, II, Member; WILLIAM F. ABELL, JR., Member; DAVID C. DANEKER, Member; DIANE G. SCHULTE, Member; J. FREDERICK SHARER, Member; Maryland State Board of Law Examiners, The District Court Building, P.O. Box 1911, Annapolis, Maryland 21404

Plaintiff, formerly a federal administrative law judge (ALJ), brings this action for declaratory and injunctive relief against enforcement of Rule 14a(iii)[1] of the Rules of Practice and Procedure of the Court of Appeals of Maryland.[2] Defendants are the Judges of the Court of

Appeals,[3] which pursuant to Maryland statute[4] promulgates rules and regulations for admission to the bar, and the Members of the Maryland State Board of Law Examiners,[5] (Board), who are responsible for the administration and enforcement of said rules and regulations, including Rule 14a(iii).[6]

In general, those desirous of being licensed to practice law in the State of Maryland must sit for the regular bar examination, a twelve-hour examination administered over two successive days twice annually.

> Since July 1972 the Maryland Bar examination [has] consisted of multiple choice questions given on one day and essay questions given on the second day. The multiple choice or Multi-State Bar Examination (MBE) questions are prepared and graded by the National Conference of Bar Examiners (NCBE) and are administered simultaneously in a majority of the states. The essay questions cover a variety of subjects and are prepared and graded by the Board members and their assistants. The subjects tested are prescribed by the Court of Appeals in Rule 7(d)....[7]

Pettit v. Gingerich, 427 F. Supp. 282, 288 (D. Md. 1977).

A less comprehensive examination may be taken in lieu of the regular bar examination by individuals who qualify under Rule 14. The "out-of-state attorney examination" lasts three hours and consists "entirely of questions requiring essay answers." Board Rule 3. The subject matter examined upon is limited to the Maryland Rules of Procedure, the Maryland District Rules governing practice and procedure in criminal and civil cases, and the Maryland Code of Professional Responsibility.

The three classes of individuals who may sit for the less comprehensive examination are described in subsection

(a) of MD. ANN. CODE, Art. 10, §7 (Supp. 1976) as those "who, for five of the preceding seven years [have] been engaged as a practitioner, judge, or teacher of law. . . ." Rule 14a(iii) implements this subsection and specifies the qualifications required of an applicant by providing

> that for at least five of the seven years immediately preceding the filing of his petition he has been regularly engaged in any of the following activities: as a practitioner of law; as a full-time teacher of law at a law school approved by the American Bar Association; or as a judge of a court of record. If engaged as a practitioner of law, such practice must have been in a jurisdiction or jurisdictions in which the applicant was admitted to practice by the highest court of such jurisdiction.[8]

Plaintiff William Jensen is a Maryland resident who has retired from 27 years of service to the United States Government as an attorney, the last eight years as an administrative law judge with the Federal Communications Commission (FCC) and the Federal Energy Regulatory Commission (FERC). Plaintiff was admitted to the Bar of the Supreme Court of Nebraska on June 24, 1950 and to the Bar of the Court of Appeals for the District of Columbia on June 29, 1979.

On December 26, 1979, plaintiff timely petitioned the Board for permission to sit for the out-of-state attorney examination, which was due to be administered on February 26, 1980, and alleged as grounds for qualification that he was a "practitioner" as that term is defined in Rule 14d[9] and that he had served as an ALJ from May 1971 to March 1979. The Board's secretary, John E. Boerner, advised plaintiff by letter dated January 16, 1980 that he was ineligible for admission under Rule 14, not because

his competence and reputation did not satisfy the definition of practitioner under Rule 14d, but because he had not been formally admitted to the D. C. bar for five years as mandated by Rule 14a(iii). Nothing was said of plaintiff's eligibility under the 'judge of a court of record' classification.

A week later, plaintiff filed exceptions to the Board's action with the Court of Appeals, alleging error in the Board's *sub silentio* determination of ineligibility as a judge of a court of record and challenging the application of Rule 14a(iii) to his situation. In a 4-3 decision, the Court of Appeals denied plaintiff's exceptions without opinion,[10] whereupon plaintiff filed the instant lawsuit, alleging a denial of equal protection of the laws in violation of the Fourteenth Amendment. Defendants initially moved to dismiss on the ground that Rule 14a(iii) is rationally related to the state's interest in regulating admission to the bar.

On June 6, 1980, the Federal Bar Association (FBA) submitted a brief *amicus curiae*[11] urging that Rule 14a(iii) be struck down as violative of the equal protection and privileges and immunities clauses, as imposing an impermissible burden on interstate commerce, and arguing in the alternative that it was error not to treat a federal ALJ as a judge of a court of record. Defendants supplemented their original motion to dismiss in order to address the FBA's contentions, and oral argument was heard on September 12, 1980.

In the interim, plaintiff had filed a motion for summary judgment. As the issues raised by both sets of motion papers are identical, the court will treat them as cross motions for summary judgment.

LACK OF SUBJECT MATTER JURISDICTION

As a threshold matter, the court must address a jurisdictional argument raised in defendants' supplemental memorandum in support of their motion. Defendants aver that this court lacks subject matter jurisdiction to review a state court's adjudication of a particular bar application, contending such review is available only by a writ of certiorari from the United States Supreme Court. In support of this contention, defendants cite significant Fourth Circuit precedents and decisions in other circuits as well. *Nestler v. Board of Law Examiners of the State of N. Carolina,* 611 F.2d 1380, 1383 & n.2 (4th Cir. 1980); *Woodard v. Virginia Board of Bar Examiners,* 598 F.2d 1395 (4th Cir. 1979) (per curiam); *see Richardson v. McFadden,* 563 F.2d 1130, 1132-34 (4th Cir. 1977) (en banc) (Hall, J., concurring), *cert. denied,* 435 U.S. 968 (1978); *Doe v. Pringle,* 550 F.2d 596, 599 (10th Cir. 1976), *cert, denied,* 431 U.S. 916 (1977); *Feldman v. State Board of Law Examiners,* 438 F.2d 699, 701 (8th Cir. 1971); *MacKay v. Nesbett,* 412 F.2d 846 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969). This array of legal authority would dispose of the case but for the fact that defendants have misconceived the gravamen of the complaint. This is not a claim that the state has unlawfully denied a particular applicant admission or has unlawfully disbarred a particular individual; this case presents a challenge to the constitutionality of the state's *rules themselves,* to whomever applied. That a federal district court has jurisdiction to entertain the latter category of lawsuit is well settled. *See Moore v. Supreme Court of S. Carolina,* 447 F. Supp. 527 (D.S.C. 1977), *aff'd mem.,* 577 F.2d 735 (4th Cir.), *cert. denied,* 439 U.S. 984 (1978); *Goldsmith v. Pringle,* 399 F. Supp. 620 (D. Colo. 1975); *Huffman v. Montana Supreme Court,* 372 F. Supp. 1175 (D. Mont.), *aff'd,* 419 U.S. 955 (1974); *Brown v. Supreme Court*

of Virginia, 359 F. Supp. 549 (E.D. Va. 1973), *aff'd sub nom. Titus v. Supreme Court of Virginia,* 414 U.S. 1034, *rehearing denied,* 414 U.S. 1138 (1974); *Keenan v. Board of Law Examiners of N. Carolina,* 317 F. Supp. 1350 (E.D. N.C. 1970).

EQUAL PROTECTION

Turning first to the equal protection claim, it is by now quite clear (as plaintiff concedes) that neither a "fundamental right" nor a "suspect classification" analysis is appropriate here. *See, e.g., Huffman v. Montana Supreme Court, supra,* 372 F. Supp. at 1181-83 (fundamental right to travel unaffected by conferral of diploma privilege on Montana law school graduates). Thus the classification created by Rule 14a(iii) is not to be subjected to "strict scrutiny", and defendants need not demonstrate a "compelling state interest" in the objectives accomplished by the rule. *See e.g., Hawkins v. Moss,* 503 F.2d 1171 (4th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975). Therefore, the equal protection analysis must proceed under the so-called "rational basis" test, under which Rule 14a(iii) must be sustained so long as it "rationally furthers a legitimate state purpose or interest." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 55 (1973). *See also Parham v. Hughes,* 441 U.S. 347, 351, 357 (1979) (where state law does not invidiously discriminate, legislative classification will be upheld if "rationally related to a permissible state objective.")

It is crucial in this inquiry to delineate precisely what it is that plaintiff is challenging. No one will gainsay that the requirement of five years' experience in practice is rationally related to the state's interest in monitoring the competence of attorneys admitted to practice. *See Shenfield v. Prather,* 387 F. Supp. 676, 688 (N.D. Miss.

1974). Similarly, courts have held there is a rational relationship to a legitimate state purpose in rules requiring different treatment in admissions to the bar depending upon the nature or quality of applicants' legal training. *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1973); *Huffman v. Montana Supreme Court, supra; Goldsmith v. Pringle, supra; see also Bib'le v. Committee of Bar Examiners of the State of California*, 162 Cal. Rptr. 426 (1980) (State may require first year law student at unaccredited law school to pass examination as precondition to eligibility to sit for general bar examination). Plaintiff challenges none of these aspects of the Maryland Rules. Plaintiff *does* question the rationality of the relationship between these concededly legitimate state interests—adequate legal education, competence, fitness to practice law—and a rule which imposes a more burdensome standard on those out-of-state attorneys who, though otherwise qualified under the rule, have practiced outside the jurisdiction in which they have been admitted.

As Mr. Justice Black wrote in his majority opinion in *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957):

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . .* Even *in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards.*

Id. at 239 (emphasis added). Insofar as plaintiff's qualifications as a practitioner are concerned, it is undisputed

that he has been a member in good standing of the Nebraska bar for 30 years, that he had 19 years' experience as an attorney for the United States Government prior to his eight-year tenure as an ALJ, and that his record was unblemished enough to satisfy the requirements of the District of Columbia bar, to which he was admitted last year.

An inevitable consequence of Rule 14a(iii) and similar rules in other jurisdictions is to ensure familiarity with those areas of law deemed essential to the competent practice of law and therefore subject to being tested upon in the general bar examination. But is there any rationality in asserting (as Rule 14a(iii) implicitly does) that one who has practiced tax law for thirty years as a private practitioner in the District of Columbia and who is admitted to the District of Columbia bar is any more familiar with Criminal Law, Property, or Torts than an attorney with equivalent experience working for the Internal Revenue Service in Washington but not admitted to the District of Columbia bar? Why is it rational to conclude that one who teaches courses in Jurisprudence, Constitutional Law, or the Philosophy of Socialist Law is perforce familiar with the substantive law of Business Associations or Commercial Transactions simply by virtue of being a professor at an accredited law school?

The Constitution demands that rules employed by the state be "substantially related to achievement of . . . [the] objectives" invoked to justify those rules. *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *Trimble v. Gordon*, 430 U.S. 762 (1977) the Supreme Court invalidated an Illinois rule making it impossible for illegitimate children to inherit by intestate succession from their fathers, on the ground that the classification bore only the "most attenuated relationship to the asserted goal." *Id.* at 768.

Lawyers today tend to specialize, and defendants' justifications for Rule 14a(iii) prove too much: assuring a basic level of competence in the subject areas emphasized leads a reasonable person ineluctably to the conclusion that the general bar examination should be a prerequisite to *all* admissions.

Nor can the requirement of practicing in the jurisdiction of admission be justified on grounds of monitoring the applicants' professional conduct. First, examining an applicant's character was one of the justifications advanced in support of a different Maryland rule, the residency requirement. *See Golden v. State Board of Law Examiners,* 452 F. Supp. 1082 (D. Md. 1978). Second, such a justification for Rule 14a(iii) could hardly explain the inclusion of law professors.

Regrettably, not all motivations behind restrictions on admissions of out-of-state attorneys are laudable. One past president of the American Bar Association has noted, "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *Time for a National Practice of Law Act,* 64 A.B.A. J. 557, 557 (1978). In discussing the evolution of Rule 14 through the year 1967, William H. Adkins, II, to former Member of the Board, observed:

> The unstated premise against liberal admission on motion is an economic one. It involves the fear of lawyers, especially those in the Washington suburban areas, that they will be immersed in a tidal wave of retired JAG officers, Department of Justice employees, and the like. Standards for admission to the bar should not however, be based on a desire to suppress competition, a sort of protective tariff approach. The only permissible consideration . . . should

> be whether the applicant has sufficient professional experience to give a reasonable assurance of at least that degree of basic legal ability and perceptiveness measurable by a bar examination. . . .

Adkins, *What Doth the Board Require of Thee?* 28 MD. L. REV. 103, 112-113 (1968) (citation omitted). That the history of the rules governing out-of-state admissions to the Maryland bar has been one of slow but progressive liberalization as a result of pressure brought to bear from various sources is well documented in Mr. Adkins' article. *Id.* at 109-13.[12]

From this history, it is clear that neither the Court of Appeals nor the Board are strangers to the evolution of a fair procedure for admitting out-of-state attorneys. By accretion, such categories as corporate house counsel became eligible for admission without taking the general bar examination. Plaintiff urges that now the time has come for the United States Government attorneys, and finding no rational justification for exclusion, this court agrees.

JUDGE OF A COURT OF RECORD[13]

As noted earlier, plaintiff alleged an independent ground for qualification under Rule 14a(iii), namely, as a "judge of a court of record." While neither the Board nor the Court of Appeals advanced reasons for denying plaintiff's admission under this heading, the legal memoranda filed in support of their motion to dismiss have informed the court of the considerations deemed relevant.

In brief, defendants argue that judges of a court of record are exempt because of a presumption that individuals occupying such positions are necessarily familiar with the principles of law covered by the Maryland Bar

Examination, but that no such presumption attaches to an ALJ, who presides over proceedings only quasi-judicial in nature and encompassing only a limited area of substantive law. Defendants argue in essence that administrative agencies are not "courts of record."

In support of this contention, defendants cite the recent decision in *Attorney General v. Johnson,* 282 Md. 274, 385 A.2d 57 (1977), *appeal dismissed,* 439 U.S. 805 (1978), as well as earlier cases, and urge that this court is "bound to give credence to the interpretation by the Maryland Court of Appeals of a State court rule." Defendants' Motion to Dismiss at 10, *citing O'Brien v. Skinner,* 414 U.S. 524, 531 (1974).[14] While this court is not "bound" by a *sub silentio* construction inferable from the failure of the Maryland Court of Appeals to address one of the claims advanced by plaintiff, due consideration should be given to the carefully reasoned opinions of that court in previous cases. Such consideration is particularly appropriate as a matter of comity where, as here, the subject of litigation is the state court's regulation of its own Bar.

Defining exactly what constitutes a "court of record" presents a surprisingly novel question. Counsel at oral argument were not able to provide such a definition, although some discussion was had in which individual components of what might in the aggregate be an adequate definition were identified. During that argument, the court had occasion to refer to BLACK'S LAW DICTIONARY 425-26 (4th ed. rev. 1968), which offers the following:

> *Courts of record* and *courts not of record.* The former being those whose acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony, and which have power to fine or imprison for contempt. Error lies to their judgments, and they

> generally possess a seal. Courts not of record are those of inferior dignity, which have no power to fine or imprison, and in which the proceedings are not enrolled or recorded.

Not unexpectedly, the forum in question is a hybrid, based on this definition. Federal administrative adjudications are "on the record" and administrative law judges, though employees of the agency, are required to be independent of the investigation and prosecutorial functions of the agency and its staff. *See* 5 U.S.C. §554(d). Decisions of ALJs are appealable to and reviewable by the agency itself, and judicial review by a federal court must usually await "final agency action." 5 U.S.C. §704. *See generally Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *N.Y.S.E. v. Bloom,* 562 F.2d 736 (D.C. Cir. 1977); *Kixmuller v. SEC,* 492 F.2d 641 (D.C. Cir. 1974). However, ALJs do not have power directly to fine or imprison for contempt and do not possess a seal, though the agency itself does.

In *Attorney General v. Johnson, supra,* the Maryland Court of Appeals reversed a declaratory judgment which had invalidated the Maryland Health Care Malpractice Claims Act for "vest[ing] judicial power in an administrative agency contrary to the [separation of powers] mandates of the Maryland Constitution. . . ." 282 Md. at 283. The statute in question required referral of medical malpractice claims to nonbinding arbitration for a preliminary determination of liability and damages before recourse could be had to the state courts. The Court of Appeals observed:

> [T]he mere performance by a nonjudicial body of a function that would in another context be considered purely judicial—*e.g.*, the determination of facts and

> the application of legal principles to those facts—cannot alone suffice to support a conclusion that the separation of powers principle has been violated. Were that not so, of course, no administrative agency performing an adjudicatory function could survive constitutional muster. As we observed in *Dep't of Nat. Res. v. Linchester*, 274 Md. 211, 222, 234 A.2d 514, 522 (1975), while administrative agencies perform activities which are legislative in nature, they are also frequently "called upon to make factual determinations and thus adjudicate"; this dual role has long been accepted as constitutionally permissible. We have pointed out before, and we reemphasize here, that adjudicatory determinations by such agencies are not judgments or decrees, *see Dal Maso v. County Commrs.*, 182 Md. 200, 205, 34 A.2d 464, 466 (1943); that such an agency ascertains questions of fact and applies the law to those facts in a particular case does not alone vest it with judicial power in the constitutional sense.

Id. at 284. Citing decisions from state courts in Iowa, Michigan, and Minnesota,[15] the Court of Appeals found "that the essence of judicial power is the final authority to render and enforce a judgment. . . ." *Id.* at 286.

Shell Oil Co. v. Supervisor of Assessments, 276 Md. 36, 343 A.2d 531 (1975) held unconstitutional (under the Maryland Constitution) a statute providing for direct review by the Court of Appeals of judgments of the Maryland Tax Court, on the ground that the latter tribunal was not clothed with the judicial authority prerequisite to the exercise of the former's appellate jurisdiction. The court's analysis quoted from an earlier decision in *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710 (1917):

> What is a judicial function does not depend solely on the mental operation by which it is performed or the importance of the Act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs, to either of the two last-named departments of government, it is not judicial.

Id. at 282.

To these arguments, amicus FBA retorts that Maryland's distinctions between judicial and administrative adjudications relevant for purposes of exercising appellate jurisdiction or enforcing separation of powers are not relevant to the question whether the qualifications for and the responsibilities of the modern federal administrative law judge are sufficiently different from those of "a judge of a court of record" to justify the discrimination in admission to Maryland's Bar. Plaintiff himself argues that in *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court expressly recognized the functional equivalence of ALJs to other federal judges in holding them entitled to the same judicial immunity.

> We think that adjudication within a federal administrative agency shares enough of the characteristics

> of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. . . .
>
> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See [5 U.S.C.] §556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

Id. at 512-13.

Although the question is thus not free from doubt, the court is persuaded that the ability to enforce and effectuate judgments and the power to impose contempt sanctions upon recalcitrant parties in order to preserve the integrity of and respect due our court system are necessary elements, absent which a tribunal may not truly be said to be a "court of record" for purposes of Rule 14a(iii). This conclusion is not at odds with *Economou*, as the necessity for absolute immunity in preserving the independence of adjudicating officers (or for that matter of prosecuting officers) is well-established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 422-26 (1976). As the court said of an ALJ in *Economou*, "His powers are often, *if not generally*, comparable to those of a trial judge. . . ." 438 U.S. at 513 (emphasis added). In *Atlas Roofing Co. v. Oc-*

cupational Safety & Health Review Commission, 430 U.S. 442 (1977). Mr. Justice White's opinion for a unanimous Court (Mr. Justice Blackmun not participating) observed: "In cases which . . . involve only 'private rights,' this Court has accepted fact-finding by an administrative agency only as an adjunct to an art. III court, analogizing the agency to a jury or a special master[16] and permitting it in admiralty cases to perform the function of the special master." *Id.* at 450, n.7 (citation omitted). *See also id.* at 455 & n.13 ("[T]hese cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings.") This court holds, therefore, that there is a rational basis in determining that federal ALJs do *not* qualify for admission to the Maryland Bar under Rule 14a(iii)'s exemption for "judges of a court of record".

In so holding, the court does not agree totally with the position advocated by the Maryland Attorney General, *i.e.*, that a "court of record" for purposes of Rule 14a(iii) is defined by Art. IV §1 of the Maryland Constitution.[17] The logical extension of such an argument would be that federal district and appellate judges are not judges of courts of record for purposes of qualifying for the exemption under Rule 15a(iii), an outcome this court believes, however, immodestly, would be clearly unconstitutional. But even if it be conceded that federal judges of Art. III courts would qualify, the application of the arguments advanced by defendants to a situation involving an Art. I tribunal such as the United States Tax Court would cause grave concern; for, as recognized in *Shell Oil v. Supervisor of Assessments, supra*, "Under the Maryland Constitution, *unlike the Federal Constitution*, the judicial func-

tion may be exercised only by those courts enumerated in the Constitution." 276 Md. at 44 (emphasis added). However, such questions are not before the court and are adverted to only to illuminate the considerations that surround a case such as this.

THE COMMERCE CLAUSE

Although the literal language of the Commerce Clause, U.S. CONST. Art. I, §8, cl. 3, speaks in terms of power bestowed upon Congress "[t]o regulate Commerce . . . among the several States, . . .", it is by now well settled that the Clause limits the authority of a State to erect barriers against interstate commerce. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525. 534-48 (1949). To the extent that matters of "legitimate local concern", *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978), permit state regulation, the proper amount of such regulation is a determination often requiring "delicate adjustment." *H. P. Hood, supra*, 336 U.S. at 553 (Black, J. dissenting). But "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624. *See also Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Pike v. Bruce Church*, 397 U.S. 137 (1970). Similarly, where a differential impact on interstate and local commerce is demonstrated, as it has been in this case, the state regulation is presumptively invalid as a discriminatory burden on interstate commerce. *Hunt, supra*, 432 U.S. at 349-50; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.1 (1951).

To rebut this presumption of invalidity, defendants point to the State's interest in assuring that members

of the legal profession are well qualified before they may be admitted to the Maryland Bar. Concededly, regulation of the practice of law is a matter of "legitimate local concern". *E.g., Schware v. Board of Examiners of New Mexico,* 353 U.S. 232 (1957). Maryland's interest is said to be particularly strong in this area, where the licensing standards at issue relate to *professional* competence; and the question arises in this case whether the ancient common law distinction between "learned professions" and "common" occupations or trades is of Constitutional moment. At one time in our history, law, along with medicine and theology, were the only "professions", *see* Gellhorn, *The Abuse of Occupational Licensing,* 44 U. CHI. L. REV. 6, 10-14 (1976), and were distinguished by no less a scholar than Mr. Justice Story from "trades". *The Schooner Nymph,* 18 Fed. Cas. 506, 507 (No. 10,388) (C.C.D. Me. 1834). However, recent decisions have cast doubt on the continuing vitality of such a distinction.

In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the Supreme Court held that minimum fee schedules required by the Virginia State Bar Association were a "restraint of *trade*" in violation of the Sherman Act. Explicit in that decision was the Court's recognition, "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." *Id.* at 788. Similarly, in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the Court held unconstitutional a ban on advertising by two attorneys operating as a "clinic" offering routine legal services inexpensively to middle-income individuals ineligible for government aid. Mr. Justice Blackmun's opinion for the Court concluded that the argument that the practice of law was somehow "above" trade was "an anachronism." *Id.* at 371-72.

Given, then, that the practice of law is commerce, (and more particularly "interstate commerce", *see Goldfarb, supra*), that Rule 14a(iii) imposes a differential impact upon the admission to the practice of law, that this impact inures to the benefit primarily of local practitioners, and that (as discussed earlier) the rule as promulgated is not rationally related to the objective, this court holds that Rule 14a(iii) is an unconstitutional burden on interstate commerce.

THE PRIVILEGES AND IMMUNITIES CLAUSE

Recent pronouncements of the Supreme Court have begun to flesh out the meaning of the long-neglected[18] Privileges and Immunities Clause of Art IV, §2 of the Constitution. In *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), the Court upheld the validity of Montana's statutory elk-hunting license scheme[19] against challenges brought under both the Privileges and Immunities Clause and the Equal Protection Clause. Mr. Justice Blackmun's majority opinion resuscitated an 1825 decision authored by Mr. Justice Bushrod Washington, *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1825), which held that the Privileges and Immunities Clause protects only certain "fundamental rights", which included:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, *professional pursuits*, or otherwise. . . .

Id. at 552[20] (emphasis added).

Also quoted was the opinion of Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 168, 180 (1869):

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the

> same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

The Court in *Baldwin* held that elk hunting was merely a means of recreation and not a fundamental right, and was therefore *not* one of those "basic and essential activities, interference with which would frustate the purposes of the formation of the Union. . . ." *Baldwin, supra,* 436 U.S. at 387. The import of this decision is that the Privileges and Immunities Clause comes into play only where equal treatment of residents and nonresidents impacts upon a fundamental right and is directly related to furthering the interests of comity and "fashioning a single nation." *Austin v. New Hampshire,* 420 U.S. 656, 661 (1975).

Later in the same term as the *Baldwin* decision, the Court handed down *Hicklin v. Orbeck,* 437 U.S. 518 (1978). Mr. Justice Brennan's opinion for a unanimous Court held unconstitutional the "Alaska Hire" statute, which gave Alaska residents an absolute preference for employment opportunities related, however remotely, to the state's oil and gas industry. The opinion relied on prior cases "holding violative of the [Privileges and Immunities] Clause

state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Id.* at 524. Thus, in *Ward v. Maryland,* 12 Wall. 418 (1871), the Court had struck down a Maryland statute

> requiring nonresident merchants to obtain licenses in order to practice their trade without requiring the same of certain similarly situated Maryland merchants; it charged nonresidents a higher license fee than those Maryland residents who were required to secure licenses; and it prohibited both resident and nonresident merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the city. . . . *Ward* thus recognized that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.

Hicklin v. Orbeck, supra, 437 U.S. at 525. Justice Brennan went on to point out, however, that this view was modified by *Toomer v. Witsell,* 334 U.S. 385 (1948), which explained that the Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it," *id.* at 396, provided such reasons are "substantial", *i.e.,* provided that "there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed."[21] *Id.* at 398. The *Hicklin* Court went on to hold that the "peculiar source of evil" identified by the Alaska legislature—i.e., a serious underemployment problem, particularly among Eskimos, Aleuts, and others in geographically remote areas—bore no substantial relationship to a statute discriminating against nonresidents.

To summarize the principles of law articulated by the *Baldwin* and *Hicklin* decisions, a violation of the Privileges and Immunities Clause is made out when state action

1. imposes upon residents and nonresidents unequal treatment

2. which directly impacts upon the interests of comity and federalism

3. where a fundamental right is involved

4. and where the discrimination does not bear a substantial relationship to the "pecular evil" at which the state action is aimed.

Proceeding under this four-step analysis, it is clear from the earlier part of this opinion that Rule 14a(iii) results in unequal treatment, but the inequality is not between residents and nonresidents but among various categories of nonresidents. In this connection, defendants cite the decision in *Hawkins v. Moss,* 503 F.d2 1171 (4th Cir. 1974), in which Judge Russell said of the Privileges and Immunities Clause:

> The basic thrust of that section is to prevent "a state from discriminating against citizens of other states in favor of its own", *Hague v. C.I.O.,* 307 U.S. 496 (1939). So long, then, as the State does not subject the migrant attorney, seeking the right to practice in the State, to no more [*sic*] onerous requirements than those imposed on its own citizens seeking such right, it cannot be said that the State has violated the section.

Id. at 1179-80 (footnote omitted).

Defendants argue further that in a recent decision in this district, Judge Frank A. Kaufman relied on *Hawkins* in

rejecting a challenge, premised on the Privileges and Immunities Clause, to the Maryland residency requirements for bar admission. *Golden v. State Board of Law Examiners,* 452 F. Supp. 1082 (D. Md. 1978), *vacated and appeal dismissed,* 614 F.2d 943 (4th Cir. 1980).

Insofar as the judgment in *Golden* was vacated both because the case was moot and because the plaintiff therein lacked standing to raise the claim, that case is without any precedential value.[22] *Hawkins,* a decision of the Fourth Circuit, is more troublesome precedent, but this court has concluded that the Supreme Court's decision three years after *Hawkins* in *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977) renders questionable the former case's interpretation of the Privileges and Immunities Clause. True, *Boston Stock Exchange* was decided under the Commerce Clause and not the Privileges and Immunities Clause, but in view of the "mutually reinforcing relationship" between the two clauses.[23] *Hicklin v. Orbeck, supra,* 437 U.S. at 531-32; *see Baldwin, supra,* 436 U.S. at 379-80, the guidance provided by Commerce Clause cases is applicable to the analysis of Privileges and Immunities questions.

Boston Stock Exchange concerned an amendment to a New York statute imposing a transfer tax on securities transactions such that out-of-state sales (by whomever made) were taxed more heavily than sales made *by nonresidents* within the state. The purpose of this statute, as amended, was to encourage nonresidents of New York to conduct sales transactions within the state and to provide relief from the competitive disadvantage thought to exist by virtue of the levying of any transfer tax at all by New York exchanges, as against out-of-state exchanges. The State Tax Commission sought to defend this statutory scheme by arguing that as only nonresidents were eligible

for the reduced rate of tax, no discrimination favoring residents over nonresidents could be said to exist. In striking down the statute, Mr. Justice White's opinion for a unanimous Court stated in part:

> There has been no prior occasion expressly to address the question whether a State may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that such discrimination is constitutionally impermissible.

429 U.S. at 335. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

This court thus considers as satisfied the first of the four elements outlined above. Although Rule 14a(iii) on its face discriminates only among various categories of nonresidents, the manifest effect of the rule is to favor the interests of Maryland residents who are members of the Maryland Bar, just as the New York statute in *Boston Stock Exchange* effectively favored the interests of members of the New York stock exchanges.

The second of the four elements is also satisfied on this record. The clash of the state's interest in regulating standards of admission to practice before its courts with the federal interest in protecting a citizen's right to pursue a legitimate occupation and earn a livelihood, *Toomer v. Witsell*, 334 U.S. 385, 403 (1948), certainly calls into play serious considerations of comity and federalism. Again, the question is not whether the state can regulate the legal profession at all but whether the Privileges and Immunities Clause imposes a limitation which this particular form of regulation has exceeded.

The third element raises the question in this case of whether the practice of law is, like the pursuit of other occupations, a fundamental right. This court has already had occasion to comment on the demise of the common law distinction between "learned professions" and "trades". *See* p. 14, *supra*. Reference has also been made to the two recent Supreme Court decisions which have helped define the contours of the Privileges and Immunities Clause; thus it has been determined that elk hunting is not a fundamental right, *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), but that pursuing a livelihood in Alaska's oil and gas industry is. *Hicklin v. Orbeck*, 437 U.S. 518 (1978). It requires no feat of judicial legerdemain to hold that the practice of law falls within the latter category rather than the former.

Finally, the fourth element has been decided in the context of the disposition of the earlier claims. Rule 14a (iii) bears no substantial relationship to the "peculiar evil" at which it is aimed because practice in a state other than the state of admission does not preclude competence or familiarity with the subject areas tested by the full bar examination.

This analysis compels the conclusion that Rule 14a(iii) also violates the Privileges and Immunities Clause of Art. IV §2.

Having concluded this discussion of the issues raised in the case, the court wishes to add one observation. Federal judges generally are keenly aware of the need to set high standards of admission to the practice of law before the courts. This court is also aware of the difficulties inherent in fashioning rules of general application to achieve these laudatory goals. Plaintiffs will indeed have won a Pyrrhic victory if, as a result of this decision, the expedited admission process is abrogated and Maryland

becomes an "examination only" jurisdiction, and this is especially true as Rule 14a is far from being permeated with the vice of unconstitutionality. Therefore, it is hoped, with sincerity, that the rule itself will not be jettisoned, but rather that as a consequence of the result here reached the rule can be so revised as to cure the constitutional defect, thus effecting the "delicate adjustment" Mr. Justice Black spoke of long ago. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 553 (1949) (Black, J. dissenting).

For the foregoing reasons, it is this 13th day of November 1980, by the United States District Court for the District of Maryland, ADJUDGED AND DECREED that Rule 14a(iii) of the Rules of Practice and Procedure of the Court of Appeals of Maryland is unconstitutional.

/s/ HERBERT F. MURRAY
United States District Judge

FOOTNOTES

1. Rule 14a regulates admission to the Maryland Bar and provides: Out-of-State Attorneys

a. Petition - Contents.

If any member of the Bar of another State, District or Territory of the United States including Puerto Rico applies for admission to the Bar of this State pursuant to section 7 of Article 10 of the Annotated Code of Maryland (1968 Replacement Volume), he shall file with the Board a petition, under oath, addressed to the Court of Appeals, in which he shall state

(i) that he intends to practice law in this State or that he intends to teach law full-time at a law school approved by the American Bar Association, naming the law school;

(ii) each jurisdiction in which, and each Court by which the petitioner was admitted to the Bar; and whether by examination, diploma privilege or on motion;

(iii) that for at least five of the seven years immediately preceding the filing of his petition he has been regularly engaged in any of the following activities: as a practitioner of law; as a full-time teacher of law at a law school approved by the American Bar Association; or as a judge of a court of record. If engaged as a practitioner of law, such practice must have been in a jurisdiction or jurisdiction in which the applicant was admitted to practice by the highest court of such jurisdiction.

The rule in controversy was originally promulgated as Rule 14a(iv) but was redesignated 14a(iii) as part of an October 14, 1979 amendment which deleted former Rule 14a(i).

2. Hereinafter cited by rule number.

3. Robert C. Murphy, Chief Judge, and Judges Marvin H. Smith, J. Dudley Digges, John C. Eldridge, Harry A. Cole, Rita C. Davidson, and Lawrence F. Rodowsky.

4. Md. Ann. Code Article 10, §7(a) (Supp. 1976):

Admission after five years' practice elsewhere.

(a) After becoming an actual resident of the State of Maryland, a member of the bar of any state, district or territory of the United States, who, for five of the preceding seven years, has been engaged as a practitioner, judge or teacher of law, shall be admitted to the bar of this State after having satisfactorily passed an examination given by the State Board of Law Examiners. In addition, as a prerequisite to admission to the bar, each applicant shall provide proof of good moral character. The Court of Appeals may make rules for the content and administration of the examination, the determination of the applicants' character and any other rules necessary to provide for the admission to

the bar of persons making application for admission on the basis of this subsection.

5. Jerrold V. Powers (Chairman), Charles H. Dorsey, Jr., William H. Price, II, William F. Abell, Jr., David G. Daneker, Diane G. Schulte, and J. Frederick Sharer.

6. Pursuant to the authority granted by Rule 7h, the Board has adopted its own rules [hereinafter cited by number as Board Rule] governing the subject matter and passing requirements of the various examinations described, *infra*.

7. Rule 7d provides:

Subject Matter

The Board shall by rule define the subject matter of the examination which shall be within but need not include all of the following areas:

Agency
Business Associations
Commercial Transactions
Constitutional Law
Contracts
Criminal Law and Procedure
Evidence
Maryland Civil Procedure
Property
Torts

Single questions or problems may encompass more than one subject-area. Subject labels on the examination shall not be necessary.

8. Rule 14a(iii) was amended to its present form by the Court of Appeals as an "emergency" measure on April 7, 1978, 5 Md. Reg. 584 (1978) and was made effective April 10, 1978. Its predecessor more closely tracked the language of the statute and provided

> that[the applicant] has for at least five years before filing his petition been regularly engaged as a practitioner or teacher of the law or a judge or any combination thereof; and that the five years during which he was so engaged was performed within seven years prior to the filing of his petition.

9. Rule 14d provides:

> d. Practitioner—Requirements
>
> For purposes of this Rule a practitioner of the law is defined as a member of the Bar of another State, District or Territory of the United States including Puerto Rico who throughout the period specified in the petition has regularly engaged in the practice of law in such jurisdiction as the principal means of earning his livelihood and whose entire professional experience and responsibilities have been sufficient to satisfy the Board that the petitioner should be admitted under this Rule. The Board may consider, among other things,

(i) the extent of the petitioner's experience in general practice;

(ii) if the petitioner is or has been a specialist, the extent of his experience and reputation for competence in such specialty;

(iii) if the petitioner is or has been an employee of a law firm, government or a corporation or other employer, the nature and extent of his professional duties and responsibilities as such employee, the extent of his contacts with and responsibility to clients or other beneficiaries of his professional skills, the extent of his professional contacts with practicing lawyers and judges and of his professional reputation among them and

(iv) any professional articles or treaties of which the petitioner has been the author.

10. The summary order of February 8, 1980, signed by Chief Judge Murphy, did indicate that dissenting judges Eldridge, Cole and Davidson considered Rule 14a(iii) arbitrary and would have sustained plaintiff's exceptions.

11. On May 23, 1980, the Federal Bar Association sought the court's permission to submit a brief *amicus curiae*, and the court having received a letter from defense counsel indicating that such a submission would be welcome, and sensible that this case would affect the efforts of government attorneys who apply for admission to the Maryland bar, granted its permission on June 2.

12. Among other things, the business community in Maryland was seriously concerned about the admission of house counsel. There were also those who felt that the definition of practitioner of the law contained in Rule Fourteenth was arbitrary. These people argued that the purpose of a rule pertaining to admissions on motion was to insure that the applicant had a background in practice indicating the sort of general familiarity with law that would be demonstrated by passing a written examination. They submitted that house counsel and government lawyers of broad experience could not reasonably be excluded merely because they had not been engaged in private practice, a practice which might, in fact, have been specialized and narrow. The matter came to a head when the petition of Robert B. Seeley, a member of the Baltimore and Ohio Railroad Company's law department, was rejected by a two-to-one Board decision. All members of the Board agreed that Mr. Seeley was qualified for admission on the basis of character and general experience. The Board majority recommended against his admission solely because he was the employee of a corporation and thus did not "maintain a[n] . . . office for the general practice of law" as required by the rule. Mr. Seeley appealed to the court of appeals. Before the case was argued, Rule Fourteenth was amended (in 1965) to permit his admission.

. . .

Adkins, *What Doth the Board Require of Thee?* 28 MD. L. REV. 103, 110 (1968).

13. In view of the disposition of the equal protection claim as applied to United States Government attorneys, it is not, strictly speaking, necessary to decide the remaining issues in the case. However, given the growing importance of these issues as the federal agencies and their professional employees proliferate, the court deems fuller consideration appropriate.

14. *O'Brien* is not authority for quite so broad a proposition. That case was an appeal from the Court of Appeals of New York's interpretation of New York election statutes to permit the State to decline to provide incarcerated individuals with a mobile voting registration procedure. The trial and intermediate appellate courts had deemed confinement a physical disability (within the meaning of the New York statutes) entitling the prisoners to vote by absentee ballot, but the New York Court of Appeals reversed that determination. The Supreme Court held that the New York high court's construction of the election statutes denied equal protection of the laws and must be reversed. In so doing, the Court noted the conflict between the lower court's construction of the statute and that of the Court of Appeals, but Mr. Chief Justice Burger's opinion properly observed that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *Id.* at 531.

15. *Cedar Rapids, Etc. v. Cedar Rapids Community Schools*, 222 N.W.2d 391, 396 (Iowa 1974); *Underwood v. McDuffee*, 15 Mich. 361, 368 (1867); *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719, 733 (1949).

16. Notably, Maryland's view is consistent with Justice White's observation in that Masters are not vested with any part of the judicial power of the state. *In re Anderson*, 272 Md. 85, 321 A. 2d 516 (1974), *cert. denied*, 421 U.S. 1000 (1975).

17. MD. CONST. art IV, §1 provides:

> The judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; *all said Courts shall be Courts of Record*, and each shall have a seal to be used in the authentication of all process issuing therefrom. (Emphasis added).

18. Perhaps because of the imposition of the Fourteenth Amendment upon our constitutional consciousness and the extraordinary emphasis that the Amendment has received, it is not surprising that the contours of Art. IV, §2, cl. 1, are not well developed, and that the relationship, if any, between the Privileges and Immunities Clause and the "privileges or immunities" language of the Fourteenth Amendment is less than clear.

Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 380 (1978).

19. Montana imposed substantively higher hunting license fees on nonresidents than on residents and required nonresidents

(but not residents) to purchase a combination license for obtaining, *e.g.*, in 1976, one elk, one deer, one black bear, game birds, and fish caught with hook and line, all for $225.00; residents had the option of procuring a license for elk alone, at a cost of $9.00, or to obtain the same combination for only $30.00. *Baldwin v. Montana Fish & Game Comm'n*, supra at 373-74.

20. Justice Blackmun's opinion in *Baldwin* noted that Justice Washington "seemingly relied on notions of 'natural rights' when he considered the reach of the Privileges and Immunities Clause," but that the latter had also employed the term 'fundamental' "in the modern as well as the 'natural right' sense." 436 U.S. at 387.

21. Thus, for example, voting, though a fundamental right under equal protection jurisprudence, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-27 (1969), is not to be regarded as such under the Privileges and Immunities Clause, for the simple reason that a state may limit the right to vote for state officials to those actually residing in the state.

22. In that the reasoning of the District Court's opinion in *Golden* might be thought to provide some guidance, notwithstanding the disposition on appeal, this court notes that the section of the opinion dealing with the scope of the Privileges and Immunities Clause consists of a direct quotation of the passage from *Hawkins v. Moss* set out in the body of this opinion, *supra*, as well as a quotation from the decision in *Ricci v. State Bd. of Law Examiners*, 427 F. Supp. 611 (E.D. Pa. 1977). The latter starts from the proposition that "[t]he right of an individual to practice law in a state court is not a privilege conferred . . . by the United States Constitution or federal statute" and goes on to assert that a state may condition the right to practice law upon establishing certain "professional and moral qualifications as proscribed [sic] by the state." *Id.* at 617. The second of these two propositions is self-evident and is not at issue in the case at bar: plaintiff does not question the State of Maryland's authority to prescribe particular qualifications as requisites to admission; indeed, plaintiff concedes that the state could decline to provide *any* abbreviated examination or other vehicle for expedited admission and instead require all candidates to sit for the full exam. The first proposition is more troublesome and will be dealt with at greater length, *infra*, in the section discussing Privileges and Immunities; suffice it to say for the present that even if the right to practice law is not a privilege granted by the *federal* constitution, it *is* a privilege granted by *state* law, including Rule 14a(iii), and is therefore subject to the usual restrictions on discrimination contained in other parts of the federal constitution, *e.g.* the equal protection clause.

23. The two clauses, though appearing in different articles of the Constitution, *i.e.* art. I, §8 and art. IV, §2, share a common origin in the Fourth Article of the Articles of Confederation and were intended by the Framers to serve the same purposes. *See* Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1470-71 (1979).

APPENDIX V

Order of Dismissal of the United States District Court of Maryland in William Jensen v. Robert C. Murphy, et al.

(Filed April 23, 1981)

Civil No. HM80-608

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM JENSEN,

v.

ROBERT C. MURPHY, *etc., et al.*

ORDER OF DISMISSAL

Plaintiff, formerly a federal administrative law judge, brought this action for declaratory and injunctive relief against enforcement of Rule 14a(iii) of the Rules of Practice and Procedure of the Court of Appeals of Maryland. Defendants are the Judges of the Court of Appeals, which pursuant to Maryland statute promulgates rules and regulations for admission to the bar, and the members of the Maryland State Board of Law Examiners, who are responsible for the administration and enforcement of said rules and regulations, including Rule 14a(iii).

Rule 14a(iii) sets forth the requirements for an attorney who has been practicing law for five out of the last seven years in a state other than Maryland to qualify for the out-of-state attorney's examination for admission to the Maryland Bar. Prior to issuance of the amendment

to Rule 14a(iii) discussed below, the rule provided that such candidates for expedited admission must have been practicing in a state in which they had been admitted by the highest court of the state.

In his complaint, plaintiff challenged the constitutionality of this requirement of practice in the jurisdiction of admission. On November 13, 1980, this court issued an order granting plaintiff the declaratory relief requested and enjoining enforcement of Rule 14a(iii) with respect to the requirement of practice in the jurisdiction of admission. Some weeks later, upon the agreement of all litigants in this action, including the Federal Bar Association in its capacity as *amicus curiae*, the court withdrew its opinion in view of impending amendment of Rule 14a(iii).

On December 19, 1980, the Court of Appeals of Maryland issued an order amending Rule 14a(iii) to delete the challenged language. A copy of the revised Rule 14a(iii) is attached and is incorporated by reference in this order. Based on consideration of this action, which deleted the restriction on the definition of "practitioner of law" hereinbefore described, and in light of the oral representations made by the Assistant Attorney General of Maryland that the Court of Appeals has no present intention of discontinuing the out-of-state attorney examination, and in the interests of comity, it is this 23 day of April, 1981, by the United States District Court for the District of Maryland,

ORDERED that the above-captioned case be, and the same hereby is, *Dismissed* as moot.

/s/ HERBERT F. MURRAY
United States District Judge

APPENDIX VI

Opinion and Order of the United States District Court of Michigan in Bruce Stein v. Mary S. Coleman et al.

(Filed March 12, 1982)

File No. K80-445 CA4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRUCE STEIN,
Plaintiff,

v.

MARY S. COLEMAN, Chief Justice, of the Michigan Supreme Court, *et al.*,
Defendants.

OPINION AND ORDER

This action was brought to challenge the constitutionality of a rule governing admission to the practice of law in Michigan. Plaintiff, a patent lawyer, sought declaratory and injunctive relief against the members of the Board of Law Examiners and the Supreme Court of the State of Michigan. The Court granted plaintiff's motion for summary judgment on January 25, 1982, and presently has before it the defendants' motion for relief from judgment and to vacate judgment.

Rule 5(A)(6)(a) of the Rules for the Board of Law Examiners provides that an applicant for admission to the bar without examination must have actively practiced law for three of the five years preceding the application.

Defendants interpreted and applied this rule in such a way that patent lawyers whose practice of patent law took place outside Michigan satisfied the rule, but patent lawyers whose practice of patent law occurred within the state did not. This Court held defendants' application of the rule to be a denial of equal protection.

Defendants suggest that the judgment should now be vacated because the relief sought by plaintiff has been granted. It appears that plaintiff has now been admitted to the State Bar of Michigan, and that a review of Rule 5(A)(6)(a) is to be undertaken by defendants for the purpose of considering amendment. Defendants have represented to the Court that until an amendment takes place, patent practitioners who are admitted to the highest court of a state but whose patent practice for three of the five years preceding the application for admission without examination takes place in Michigan, will be admitted without examination, provided all other requisite qualifications are met. Defendants have further represented that any amendment of the rule will not retroactively affect plaintiff and other similarly-situated patent practitioners who are admitted without examination prior to the amendment. Finally, it appears that plaintiff is not opposed to defendants' motion.

In view of these circumstances, and in the interests of comity, the Court is of the opinion that defendants' motion should be granted. This Court's Summary Judgment of January 25, 1982, is hereby vacated, and the accompanying Opinion is withdrawn and this case is hereby dismissed.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U. S. District Judge